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No._____

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IN THE

# Supreme Court of the United States

October Term, 1982

CITY OF ALLEN PARK,

Petitioner,

v

ECORSE POLLUTION ABATEMENT DRAIN NO. 2 DRAINAGE DISTRICT, a body corporate and CHARLES N. YOUNGBLOOD, Wayne County Drain Commissioner,

Respondents.

## RESPONDENTS' RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## QUESTIONS PRESENTED

I.

DO STATEMENTS AND ACTIONS BY A UNITED STATES DISTRICT COURT JUDGE, MADE AND TAKEN IN THE COURSE OF PROCEEDINGS TO CARRY OUT AND TO ENFORCE THE INJUNCTIVE POLLUTION CONTROL MANDATES OF HIS PREVIOUSLY ENTERED FINAL ORDER AND JUDGMENT AND PURSUANT TO RETAINED JURISDICTION TO IMPLEMENT THE JUDGMENT, TO THE EFFECT THAT HE WILL INSIST UPON COMPLIANCE WITH THE FINAL ORDER AND JUDGMENT "FORTHWITH" AND THAT THE OFFICERS AND BOARD MEMBERS OF DEFENDANT DRAINAGE DISTRICTS AND THE OFFICERS, CITIZENS AND RESIDENTS OF THE DEFENDANT CITY ALL MUST PROCEED FORTHWITH TO ACQUIRE AND TO FUND THE MANDATED POLLUTION CONTROL FACILITIES, CONSTITUTE A BASIS FOR REASONABLY QUESTIONING THE IMPARTIALITY OF THE JUDGE SO THAT HE SHOULD RECUSE HIMSELF FROM PRESIDING IN FURTHER ENFORCEMENT PROCEEDINGS OR IN PROCEEDINGS TO EXAMINE AND REVIEW, BY APPEAL IN THE NATURE OF COMMON LAW CERTIORARI IN MICHIGAN (ON THE BASIS OF PENDENT JURISDICTION AS RETAINED IN THE FINAL ORDER AND JUDGMENT) ACTIONS OF BOARD MEMBERS OF ONE OF THE DEFENDANT DRAINAGE DISTRICTS TAKEN IN FURTHERANCE OF THE INJUNCTIVE MANDATE AS ABOVE STATED?

II.

DOES A RECUSAL MOTION UNDER 28 USC § 455(a) REQUIRE AN OBJECTIVE EVALUATION OF THE APPEARANCE OF PARTIALITY BASED ON A REASONABLE LOCAL OBSERVER AND IF SO, MAY THE COURT OF APPEALS DENY RECUSAL *de novo* WHERE THE TRIAL JUDGE HIMSELF UTILIZED A SUBJECTIVE TEST AND WITHOUT ANY RECORD AS TO LOCAL STANDARDS, CUSTOMS, PRACTICES OR CONTROVERSIES?

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CITY OF ALLEN PARK,

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ECORSE POLLUTION ABATEMENT DRAIN NO. 2 DRAINAGE DISTRICT, a body corporate and CHARLES N. YOUNGBLOOD, Wayne County Drain Commissioner,

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## RESPONDENTS' RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## CITATIONS TO THE OPINIONS AND JUDGMENTS BELOW

*City of Allen Park* v. *Ecorse Pollution Abatement*, 518 F. Supp. 1079 (ED Mich 1981) aff'd CA6 on 11-15-82, *reh. denied* CA6 on 1-11-83.

*State of Mich.* v. *City of Allen Park*, 501 F. Supp. 1007 (ED Mich 1980), *aff'd* 667 F2d 1028 (CA 1981), *cert. denied*, 72 L Ed 2d 443 (1982).

Final Order and Judgment, (ED Mich 6-30-80) (RA-1)*.

*The symbol "RA" refers to Respondents' additions to the Appendix attached hereto.

## JURISDICTION

Jurisdiction is vested in this court pursuant to Section 505 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C § 1365(a) ("FWPCA"), and 28 U.S.C. § 1331, in that the amount in controversy exceeds the sum or value of $10,000 and arises under the Constitution, laws or treaties of the United States. Pendent jurisdiction exists for the state law claims and relief sought under the Water Resource Commission Act, M.C.L. § 323.7(1) (M.S.A. § 3.527(1)); the Drain Code, M.C.L. § 280.461 *et seq.* (M.S.A. § 11.1461 *et seq.*); and the Court Order Bond Act, M.C.L. § 123.247 (M.S.A. § 5.2267). The plaintiffs seek a declaratory judgment under 28 U.S.C. § 2201 and injunctive relief under 28 U.S.C. § 2202.

The City of Allen Park seeks recusal of United States District Court Chief Judge Feikens pursuant to 28 USC § 455(a), and files the Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Those statutes, Federal and Michigan, specified above in the statement of jurisdiction and the enforcement provisions of Federal Water Pollution Control Act § 309,33 U.S.C. § 1319 and Michigan Compiled Laws § 323.3, (M.S.A. § 3.523).

## STATEMENT OF THE CASE

A.

The United States District Court For the Eastern District of Michigan, Southern Division, Chief Judge John Feikens, Presiding, and the United States Court of Appeals For The Sixth Circuit have heard and decided two contested matters involving the City of Allen Park and its counsel who are now filing this second Petition for Writ of Certiorari in The Supreme Court of the United States. See earlier denial of Certiorari by this Supreme Court of the United States, as reported in 72 L. Ed. 2d 443 (1982).

In the first contested matter, chronologically, the City of Allen Park was one of the defendants in two civil actions, consolidated for hearing (501 F. Supp 1012) and fully reported in *State of Michigan, et al.* v. *City of Allen Park, et al.*, 501 F. Supp 1007 (ED Mich 1980) *aff'd* 667 F. 2d 1028 (CA 1981), *cert. denied* 72 L.Ed. 2d 443 (1982). The Final Order and Judgment entered by Chief Judge Feikens in this first action (RA-1)* contains in its first four paragraphs (A., B., C. and D.) mandates addressed to the defendants, Wayne County (Michigan) Drain Commissioner, The Le Blanc Tile Drainage District and The Drainage District for the Ecorse Creek Pollution Abatement Drain No. 1. These mandates direct and require these defendants forthwith to fund and to construct the county drain project identified as Element II Facilities Plan, Alternative 1, in its entirety, including without limitation, contracts 1-5 and a project for a retention basin. The mandates expressed in paragraphs B. and C. (RA-2) also direct and require the defendant City of Allen Park to participate in the funding and construction of the drain project and to pay this City's share of the funding by levy of tax to the extent necessary.

*The symbol "RA" refers to Respondents' additions to the Appendix attached hereto.

On May 20, 1981, in this first action (*not in the action now before this Supreme Court of the United States*) the parties appeared before Chief Judge Feikens for hearing on a motion by the State of Michigan seeking to force speedy compliance with these mandates in the Final Order and Judgement of June 30, 1980. (RA-1, A-42-46 and 55 et seq.). The thrust of this motion was against the defendant Wayne County Drain Commissioner and against the two drainage districts. The complaint of the State of Michigan was that these defendants were not acting speedily enough, were not acting "forthwith". (A-55 & 56). At that time, over a year after the trial of and decision in this first action by Chief Judge Feikens (501 F.Supp. 1007 and RA-1) and after the defendants drain commissioner and drainage district had taken many actions and procedures to comply with the mandates of the Final Order and Judgment (518 F. Supp. *1080*), the City of Allen Park and its counsel professed wonderment at the presence in court of bond counsel for one of the defendant drainage districts and complained of the actions of the Chief Judge in answering (A-39) a large number of letters, purportedly from citizens of the City of Allen Park, questioning the Chief Judge about his decisions and mandate against the City (A-62 and 63, and A-42 and 43).

The proceedings and hearing occurring on May 20, 1981, (A-42-46 and A-53-79) dealt with the enforcement by Chief Judge Feikens of his Final Order and Judgment of June 30, 1980, not with the review by Chief Judge Feikens on pendent jurisdiction grounds by certiorari, of a Final Order of Apportionment entered by the Drainage Board of one of the defendant drainage districts in drain proceedings conducted under state law. The bias and impartiality of which the City of Allen Park and its counsel complain is that Chief Judge Feikens has urged, *in fact* has *demanded*, that his orders must be obeyed and carried out.

## ARGUMENT

### A.

Because a United States District Court Judge is not likely to be recused for demanding that his orders be obeyed or for further proceedings after judgment in a matter in which jurisdiction is retained (RA-3), the City of Allen Park and its counsel appear to have embarked upon a program to bait the Judge and cause further delay and difficulty. Thus, the attempt to claim in the first of the Questions Presented (Pet.-1) that the "extra judicial contacts" were by the Judge with the residents, whereas in fact the residents wrote to the Judge in such legalistic form* and at such a common time as to appear organized and orchestrated. (A-93 and 94).

A judgment against a city is binding on all of its citizens and residents whom the city is deemed to represent, 50 C.J.S. Judgments § 796, at p. 338, as quoted and applied in *Stromberg* v. *Board of Education*, Ohio Sup. Ct., 413 N.W. 2d 1184 (1980); *Roberts* v. *Goldner*, N.J. Sup. Ct., 397 A. 2d 1090 (1979). So we have a situation in which parties in an action pending by retained jurisdiction are directly contacting the judge, not through their counsel and not in the presence or with the knowledge of other counsel. That is the improper extra judicial contact, not the reply of the judge.

Chief Judge Feikens had an obligation to warn all of the parties to the first action involving pollution control that his Final Order and Judgment was binding and must be obeyed. In particular it was his duty to explain to and warn the City of Allen Park and its citizens and residents that its leadership and its counsel were not carrying out their duty to comply with the Court's Order and Judgment. Such action can scarcely be grounds for

*The common complaint of the letter writers was that they had no hearing as an individual on the necessity of and plans for the project. (A-94)

recusal, else no orders and judgments will ever be obeyed.

It should also be noted that counsel for the City of Allen Park commence statement of the first of the Questions Presented (Pet.-i) by the words "In a highly controversial case", as a basis to urge that Chief Judge Feikens should be recused for creating "controversy" and therefore an appearance of partiality and bias. However, it should also be noted that this "controversy" is only one instance of an artificial controversy being developed in these lengthy proceedings. All of these contrived controversies have no relevance to the merits of the pollution abatement problem and have served, apparently by design, to delay for six years the commencement of acquisition of pollution abatement facilities in the City of Allen Park. In the neighboring cities, acquisition commenced within two years and is now essentially complete but pollution will not be abated until the final Allen Park link is also completed.

The voluminous two volume joint appendix submitted to the Court of Appeals for the Sixth Circuit contains many transcripts of public hearings and minutes of public meetings detailing hours of "controversy" and demonstrations (A-70) which were totally irrelevant to the purpose of the public hearings or of the public meetings. Whether such activities were controlled or uncontrolled, they demonstrated in either case, as Chief Judge Feikens pointed out in his letter to citizens (A-39) and in his remarks in open court (A-45 and 63), that the officers and counsel for the City of Allen Park were not properly advising the citizens and residents of the City of the binding effect, subject to rights of appeal now concluded, of the Final Order and Judgment.

However, the controversies came into being in the City of Allen Park and whatever the reasons for the reactions of the citizens and residents of the City, this

cannot and does not create the milieu in which to seek an "objective" test of a perception of bias or impartiality as to a United States District Court Judge who has ordered these citizens and residents to do something they appear not to want to do. This is a classic example of an attempt to remove a District Court Judge "to avoid the consequences of his expected adverse decision". (A-92) Or to convince a District Court Judge "to avoid sitting on difficult or controversial cases". (A-92).

That the actions and reactions of Chief Judge Feikens and of the citizens and residents of the City of Allen Park are not grounds for recusal, voluntarily or on motion, pursuant to P.L. 93-512, 28 U.S.C. § 455 *et seq.* can scarcely be better stated than it has been in the legislative history of that Public Law reading as follows:

> "While the proposed legislation would remove the 'duty to sit' concept of present law, a cautionary note is in order. No judge, of course, has a duty to sit where his impartiality might be reasonably questioned. However, the new test should not be used by judges to avoid sitting on difficult or controversial cases.
>
> "At the same time, in assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision. Disqualification for lack of impartiality must have a *reasonable* basis. Nothing in this proposed legislation should be read to warrant the transformation of the litigant's fear that a judge may decide a question against him into a 'reasonable fear' that the judge will not be impartial. Litigants ought not to have

to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges to their own choice.

"Finally, while the proposed legislation would adopt an objective test, it is not designed to alter the standard of appellate review on disqualification issues. The issue of disqualification is a sensitive question of assessing all the facts and circumstances in order to determine whether the failure to disqualify was an abuse of sound judicial discretion." 3 U.S. Cong. & Adm. News, at 6355 (93rd Cong., 2d Sess., 1974) (Emphasis in original.)

**B.**

By claiming that he, and therefore presumably every other citizen and resident of the City of Allen Park, was confused as to the relationship of attorney Charles R. Moon (one of the writers of this Response) to the motion by the State of Michigan heard on May 20, 1981, *not in the case in which this Petition For Writ of Certiorari is filed*, but in the earlier case reported in 501 F. Supp. 1007, counsel for the City believes that he elicited remarks from Chief Judge Feikens which demonstrate bias and partiality.

In his argument to the District Judge, counsel for Petitioner introduced the interesting concept of a "neutral *amicus curiae*" (A-85 and Petition p.7). It may have once been true in legal history that there could be or was an attorney who appeared in court, without client and cause, to advise a court in an academic sense about particular problems before the court. However, this was never the situation in these proceedings. In the trial of

the first contested matter, reported in 501 F. Supp. 1007, the appearance by Mr. Moon is clearly stated to be as follows:

> "Brief Amicus Curiae on Behalf of Charles N. Youngblood, Wayne County Drain Commissioner And Chairman of the Drainage Board for the Drainage District for the Ecorse Creek Pollution Abatement Drain, a Michigan Public Corporation" (RA-3). (From CA6 Joint Appendix p. 601)

The *amicus curiae* is at all times Charles N. Youngblood, the Wayne County Drain Commissioner, and not Charles R. Moon, the bond counsel who represented the Wayne County Drain Commissioner and wrote the Brief *Amicus Curiae* filed on behalf of the Drain Commissioner.

This counsel for Petitioner admitted reluctantly that he knew. (A-84 and 85) Counsel for Petitioner also knew that, commencing on September 17, 1980, and continuing up to the May 20, 1981, enforcement hearing before the District Judge, Charles R. Moon was employed as bond counsel for the Drainage District for the Ecorse Creek Pollution Abatement Drain to assist and advise said Drainage District, a Michigan public corporation, in carrying out the injunctive mandates against it as set forth in paragraphs A., C. and D. of the Final Order and Judgment. (RA-2) Such activities by Mr. Moon as bond counsel made it necessary that he appear at the enforcement hearing to explain what actions the defendant Drainage District had or had not taken and why. None of this seems very unusual or very inimical to the interests of the co-defendant City of Allen Park. In fact, no assertions have been made or proof offered to show that such actions by Mr. Moon

prejudiced the City of Allen Park in any way, possibly because these actions are necessary to receipt of the substantial Federal and State Grants.

Now, however, in this Petition for Writ of Cetiorari to be issued by the Supreme Court of the United States, it is claimed that the drain proceedings including issuance of a Final Order of Apportionment of the costs of pollution abatement facilities, all as described in *City of Allen Park* v. *Ecorse Pollution Abatement*, 518 F. Supp. 1079 (1981), are irregular and improper and damaging to the interests of the City. (Petition pps. 8, 9, 10 and 14). Without explanation, these issues concerning the alleged defects in the drain proceedings and the Final Order of Apportionment are not included in the Petition for Writ of Certiorari, even though these issues were decided against the Petitioner by the District Judge (A-21) and by the Court of Appeals (A-4).

Also without explanation, *and without support of any facts or material in the record*, it is asserted that Mr. Moon appeared as an *amicus curiae*, sort of *sua sponte* as it were, "acting as a neutral *amicus* solely for purpose of advising the court", (Petition p. 7) and then it was discovered that his legal services were paid for by the Drain Commissioner. (A-44) This is a fact shown in the record all along (RA-8) but somehow not apparent to counsel for Petitioner City. Then assertion is now made (Petition p. 8) and repeated over and over (Petition pps. 9, 10 and 14) that Mr. Moon is "largely responsible for" or "intimately involved with" or "directly responsible for" or "played a significant role in actually formulating" the apportionment decision which is now allegedly wrong and erroneous even though there has been no further appeal from the decisions of the District Court Judge and the Court of Appeals panel of Judges which confirmed the Final Order of Apportionment. (A-7 and A-30)

Nowhere is there any fact to support the assertion that Mr. Moon made or directed the apportionment decision, a decision which by its nature is not based on legal principles but on economic and engineering matters. Reference is made to page 211 of the Joint Appendix filed in the Court of Appeals for the Sixth Circuit (RA-10) where appears the paragraph taken from the minutes of the public hearing on apportionments held on November 12, 1980, reading as follows:

> "At the request of Kenneth D. Kruse, attorney for the City of Allen Park, it was agreed by members of the Drainage Board that the hearing on apportionments should be recessed, after all persons present who want to speak have been heard, so that Mr. Kruse and other city officials can confer with Messrs. Trim and Shapiro and Bink to verify the method of apportionment and the calculations used therefor."

Messrs. Trim and Shapiro and Bink are all professional engineering consultants to the Drainage District. (RA-7).

By law the Drainage Board for the Drainage District must apportion the costs of the pollution abatement project, first tentatively (MCL § 280.468; MSA § 11.1468) and then by Final Order of Apportionment adopted subsequent to public hearing (MCL § 280.469; MSA § 11.1469). It is concluded by the District Court Judge in his opinion reported in 518 F. Supp. 1079, (A-26) as follows:

> "2. The apportionment of costs of the Drain Project are to be made by defendants, according to benefits and contributions by the public corporations involved herein, in percentages of said costs to be borne by each pubic corporation including the plaintiff, and there is nothing in the

Certified Record showing that the defendants did not so apportion the costs in accordance with their best judgment and without mistake or abuse of discretion or fraud or bad faith or in violation of law. (At page 1081)

"6. The burden rests with plaintiff to show by facts submitted to defendants in the hearing required by law, the reasons why and the extent and manner in which the tentative apportionments are invalid or improper so as to overcome the presumption that defendants, in exercising their discretion and judgment as required by law, acted properly and in accordance with that law. The plaintiff has not met that burden, and there is nothing in the Certified Record to show fraud, bad faith, dishonesty, abuse of discretion or failure to comply with applicable law on the part of defendants." (At page 1082)

These findings and conclusion are made by the District Court Judge in an appeal to him by common law writ of certiorari to review the decision of an administrative board. As previously noted with respect to proceedings to enforce an existing judgment, the test for recusal of a judge acting in such an appellate capacity has to be different than a test applied to a trial judge prior to trial.

Respondents respectfully submit that viewed in its proper context and "assessing all the facts and circumstances", the first of the Questions Presented by Petitioner to this Court deals not with bias or partiality of a judge but only with an open attempt by a litigant to have a judge of its own choice. There is no ground for recusal. Such is the correct judgment of the United States Court of Appeals for the Sixth Circuit (A-6) of which review by writ of certiorari is here sought and should be denied.

## II.

**DOES A RECUSAL MOTION UNDER 28 USC § 455(a) REQUIRE AN OBJECTIVE EVALUATION OF THE APPEARANCE OF PARTIALITY BASED ON A REASONABLE LOCAL OBSERVER AND IF SO, MAY THE COURT OF APPEALS DENY RECUSAL *de novo* WHERE THE TRIAL JUDGE HIMSELF UTILIZED A SUBJECTIVE TEST AND WITHOUT ANY RECORD AS TO LOCAL STANDARDS, CUSTOMS, PRACTICES OR CONTROVERSIES?**

### A.

The purpose of this second of the Questions Presented appears to be to raise issues and to form a basis for arguments not based upon anything in the record before the United States District Court or before the United States Court of Appeals, except perhaps for some allegations, not record supported, and some arguments *first* presented in a document filed on behalf of Petitioner, sometime after November 29, 1982, in the Court of Appeals for the Sixth Circuit and entitled Petition for Rehearing and Suggestion for Hearing En Banc or in the Alternative, To Correct Record Opinion In This Court. (A-9)

One of these new issues and arguments is that the District Court Judge should have made a record, by testimony or in some means, as to what a "reasonable, objective observer" would feel about his impartiality and the fairness of the judicial proceedings (See Petitioner's Brief, pps. 17 and 18). This is indeed a strange and wondrous concept. In the first place, Petitioner moved for recusal and as moving party would seem to have the primary responsibility to make whatever "record" is required to support the motion. Of course there is no offer of proofs by Petitioner in the court records, not even the presentation of affidavits. The idea that the District Judge, or even the Court of Appeals in a *de novo* hearing, should have supplied this proof is indeed novel.

Beyond that, it is clear that here again the counsel for Petitioner is trying to assert that the District Judge shows bias and partiality when he tells officers, citizens and residents of the defendant City that they must obey his Final Order and Judgment against them and they loudly reply, "That is not fair, you are biased against us!" (A-95)

The second idea which counsel for Petitioner City of Allen Park appears to be now trying to advance is the idea that the City cannot have a fair trial because "everyone is against us". The trial, of course, is over and the City feels it has lost even though the required abatement of pollution should be an ultimate advantage to it. It is probably true that the City at this time has few "friends". Its neighboring cities have spent large sums and incurred large obligations to abate pollution but the reluctance of the City of Allen Park to do likewise has deprived its neighbors of the full benefits of these expenditures. The State of Michigan is also not very happy with the City or any of the other defendants, for that matter, for not obeying their orders, rules and regulations. The City may really have difficulty finding a friend or a supporter at this time and in this southeastern Michigan area, but is that bias or partiality? No doubt the City and its citizens and residents "wish the whole thing would go away" and many probably feel that the first thing to do is "to get rid of that Judge". (A-95)

If recusal under § 455(a) is truly "designed to protect the public — and ultimately therefor, the administration of justice itself", (Petitioner's Brief, p. 22) then it can never be used to remove a Judge so as to prevent him from enforcing and carrying out a Judgment against the party seeking his recusal.

B.

Counsel for Petitioner strangely states two propositions in support of recusal and then sets forth citations of and quotations from cases decided by the Court of Appeals for the Sixth Circuit which really hold to the contrary.

First, counsel for Petitioner asserts at page 15 of its brief that "the trial court's resort to legislative history was totally improper". This immediately follows a quotation form *Roberts* v. *Bailar*, 625 F. 2d 125 (6th Cir. 1980), the principal case on which counsel for Petitioner relies throughout the brief, which reads, in part, as follows:

> " 'If there is a reasonable factual basis for doubting the judges impartiality,' the Congressional Committee reports on the 1974 amendment to § 455 explain, the judge 'should disqualify himself and let another judge preside over the case' ". (*Roberts, supra*, 625 F 2d at p. 129)*

Second, counsel for Petitioner asserts at page 16 of its brief, "that extra-judicial statements or conduct may be a basis for disqualification". This statement is followed by the citation of several cases, including one from the 6th Circuit Court of Appeals, *Bradley* v. *Milliken*, 620 F. 2d 1143 (6th Cir. 1980), from which the Court of Appeals is quoted as holding as follows:

> "To make out a case for recusal under § 455(a), a movant must rely on *extra-judicial* conduct rather than matters arising in a *judicial context*". (emphasis added) (620 F. 2d at p. 1157)

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*See also the lengthy quotation in Petitioner's brief on pps. 19, 20 and 21 where again legislative history is discussed to justify the decision of a United States District Court in Idaho.

The foregoing assessment in this brief for Respondents of "all the facts and circumstances" demonstrates clearly that the conduct of Chief Judge Feikens on which Petitioner relies all arose in a *judicial context* in the very process of enforcement of injunctive pollution control mandates pursuant to retained jurisdiction to implement a Judgment. Recusal was denied and the denial affirmed in *Bradley, supra,* (ex parte contacts) and in a litany of other recent cases in which, in several cases, "all the facts and circumstances" were far more compelling than those in this case. See for example the following:

> *Southerland* v *Irons*, 628 F2d 978, 980 (CA6 1980) (involvement in previous suit); *Schultz* v *Newsweek*, 668 F2d 911, 919 (CA 1982) (defendant's news article favorable to judge); *In Re International Business Machine Corp*, 618 F2d 923, 927-932 (CA 1980) (child-like innocence not required, sporadic flare-ups toward counsel); *United States* v *Heldt*, 668 F2d 1238, 1269-1274 (CADC 1981) (alleged concealment of security measures); *United States* v *Phillips*, 664 F2d 971, 1000-1004 (CA5 1981) (ex parte contacts); *Hagans* v *Andrus*, 651 F2d 622 (CA9 1981) (comment in sex discrimination case that plaintiff went a long way before encountering discrimination); *Matter of George Paneling Supply, Inc.*, 581 F2d 520, 522 (CA5 1978) (ex parte conference); *In Re United States*, 666 F2d 690, 695 (CA1 1981) (prior relationship between judge and defendant); *United States* v *Coven* 662 F2d 162, 168 (CA2 1981) (knowledge of evidence from prior proceeding); *United States* v *Conforte*, 624 F2d 869, 878-879

(CA9 1980), *cert. denied*, 449 US 1012 (1980) (rejection by judge of bridge club application and refusal to seek funds for college from defendant owner of house of prostitution); *Ma* v *Community Bank*, 686 F2d 459, 472 (CA7 1982) (judge lived in Depere, Wis. same town as bank's attorney and knew the bank attorney had practiced law a considerable time); *Huff* v *Standard Life Ins. Co.*, 683 F2d 1363, 1369-1370 (CA11 1982) (judge's previous affiliation with defendant's law firm no abuse of discretion); *In Re Federal Skywalk Cases*, 680 F2d 1175 1183-1184 (CA8 1982) (ex parte telephone calls to counsel asking if his client would serve as class representative, if a class was certified. Claim of bias must be evaluated in light of the full record and not an isolated incident).

## CONCLUSION

This Petition for Writ of Certiorari presents, therefore, no instances of judicial error and no facts and circumstances of any unusual nature with respect to which this Supreme Court of the United States should examine the question of recusal of a United States District Court Judge.

Petitioner in its Questions Presented and in its Statement of the Case and its Argument does not present "all the relevant facts" as required by the United States Court of Appeals for the Sixth Circuit (A-6) or "all the facts and circumstances" to be assessed "in order to determine whether the failure to disqualify was an abuse of sound judicial discretion," as Congress intended in enacting P.L. 93-512, 28 U.S.C. 455 *et seq.* 3 U.S. Cong. & Adm. News, at 6355 (93rd Cong., 2d Sess. 1974).

Therefore, it is respectfully requested on behalf of Respondents that the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit in this matter be denied.

Respectfully submitted,

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VAN DUSEN & FREEMAN
*Counsel for Respondent*
*Drainage District for Ecorse Creek*
*Pollution Abatement Drain No. 2*

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*Counsel for Respondent*
*Charles N. Youngblood,*
*Wayne County Drain Commissioner*

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711 W. Ann Arbor Trail
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Dated: May 10, 1983

# RESPONDENTS' APPENDIX

## FINAL ORDER AND JUDGMENT

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Filed July 1, 1980)

(State of Michigan, The Administrator of the United States Environmental Protection Agency, Greenfield Construction Company, Inc., Lanzo Construction Company, Inc., Giannetti Construction of Michigan, Inc., and Rocco Ferrera & Company, Inc., Plaintiffs, vs. The City of Allen Park: The Le Blanc Tile Drainage District: The Drainage District for the Ecorse Creek Pollution Abatement Drain No. 1; The County of Wayne; Charles N. Youngblood, the Wayne County Drain Commissioner, Defendants — File No. 79-74681; State of Michigan, Robert Lindisch and Phil Serpetti, Jr., Plaintiffs, vs. The City of Allen Park, Michigan, a Michigan municipal corporation, Defendant — File No. 79-74682)

At a session of said Court, held in the Federal Building, City of Detroit, Michigan, on the 30th day of June, 1980.

Present: Honorable John Feikens
Chief Judge, U.S. District Court

This action came before the Honorable John Feikens for trial; testimony, documentary evidence, briefs and arguments of counsel were received and considered, the Court having on May 14, 1980 issued findings of fact and conclusions of law on the record, the court now orders and adjudges as follows:

A. It is Ordered and Adjudged that the defendant drainage districts and the defendant drain commissioner

shall proceed forthwith to fund and construct the Element II Facilities Plan, Alternative 1, in its entirety, including without limitation, contracts 1-5 and a project for a retention basin.

B. It is Further Ordered and Adjudged that the City of Allen Park shall forthwith participate in the funding and construction of the Element II Facilities Plan, Alternative 1, in accordance with its terms, including without limitation, contracts 1-5 and a project for a retention basin.

C. It is Further Ordered and Adjudged that pursuant to the State of Michigan Court Order Bond Act, Act No. 320 of the Public Acts of 1927, as amended, and the State of Michigan Drain Code, Act No. 40 of the Public Acts of 1956, as amended, defendant drainage districts and the defendant drain commissioner shall apportion and assess the cost of the Element II Facilities Plan, Alternative 1, including sewer separation in the City of Allen Park against the public corporations benefitted, which includes the City of Allen Park, and that upon being so assessed the City of Allen Park shall in each year provide funds necessary to meet such obligation, which may include but is not necessarily limited to the levying of a tax on all taxable property in its jurisdiction in an amount necessary to pay the amount payable on the assessment for that year and that such tax shall be levied without limitation as to rate or amount. That such tax, being for the purpose of public health and safety is not subject to public referendum pursuant to Article IX section 6 or sections 25 through 34 of the 1963 Michigan Constitution as amended.

D. It is Further Ordered and Adjudged that the defendant drain commissioner and the drainage districts aforesaid shall immediately proceed to locate and obtain

appropriate MDNR and EPA approval and to redesign and construct the project for a retention basin as defined in the Element II Facilities Plan, Alternative 1.

E. It is Further Ordered and Adjudged that the City of Allen Park's cross-claim against USEPA is dismissed.

F. It is Further Ordered and Adjudged that due to the urgency of this action and the serious public questions involved this court will retain jurisdiction for the purpose of implementing the Judgment.

/s/ John Feikens
Chief Judge, U.S. District Court

*Pages 601 and 602 – Joint Appendix, CA6*

**INTRODUCTION AND REQUEST FOR PERMISSION TO FILE BRIEF AMICUS**

In this matter, the Chief Judge presiding has asked Counsel for various of the parties to obtain through the office of the Wayne County Drain Commissioner a discussion of the principles of State law and of the requirements of the municipal bond market which bear upon the legal power and the practical aspects involved in possible orders issued and remedies invoked by the Federal District Court. The purpose of this Brief Amicus Curiae is not to take a partisan position in the litigation on the merits nor to participate in any dispute of fact or law as pleaded or proved. Therefore, factual statements in this Brief Amicus Curiae are assumptions and premises for the purposes of discussion, except for those facts which are items of public record in the office of the Wayne County Drain Commissioner or of the City Clerk of the City of Allen Park or in the records of this Federal District Court.

Permission is hereby requested to file this Brief Amicus Curiae on behalf of Charles N. Youngblood, Wayne County Drain Commissioner and Chairman of the Drainage Board for the Drainage District for the Ecorse Creek Pollution Abatement Drain, a Michigan Public Corporation. As will appear herein, the actions and activities of the Amicus Curiae during the years 1977 and 1978, in particular, are most pertinent as explanations of the background out of which this present litigation has grown. Because the Amicus Curiae became, by the processes and provisions of the pollution control grant programs of the U.S. Environmental Protection Agency (EPA) and the Michigan Department of Natural Resources (DNR), the lead applicant to make application for, accept and expend the pollution abatement grants from the EPA and DNR, this Amicus Curiae has been and presumably still is one of the principal actors in the recognition, definition and solution of the issues presented in this litigation for this Federal District Court to resolve. In requesting permission to file this Brief Amicus Curiae, this Amicus Curiae is renewing and re-affirming in his official capacities herein named, his continued availability and willingness to continue as lead applicant for the pollution control grants and as the financing and acquisition vehicle for the required pollution abatement facilities as determined by this Federal District Court and as permitted by law.

RA-5

*Pages 44-48 – Joint Appendix, CA6*

**ECORSE POLLUTION ABATEMENT**
**DRAIN No. 2 DRAINAGE DISTRICT PROCEEDINGS**

(United States Court of Appeals
for the Sixth Circuit)

(City of Allen Park, a municipal corporation, Plaintiff-Appellant, vs Ecorse Creek Pollution Abatement Drain No. 2 Drainage District, a body corporate, and Charles N. Youngblood, Wayne County Drain Commissioner, Defendants-Appellees — Case No. 81-1554; L.C. No. 81-70353)

1. Meeting of Drainage Board for the Ecorse Creek Pollution Abatement Drain No. 2 held September 17, 1980.
2. Minutes of the Meeting of the Drainage Board for the Ecorse Creek Pollution Abatement Drain No. 2, held November 12, 1980.
3. Ecorse Creek Pollution Abatement Drain No. 2 Public Hearing for the Allen Park Apportionment November 12, 1980.
4. Minutes of the Meeting of the Drainage Board for the Ecorse Creek Pollution Abatement Drain No. 2 held December 10, 1980.
5. Ecorse Creek Pollution Abatement Drain No. 2 Public Hearing for the Allen Park Apportionment held December 10, 1980.
6. Minutes of the Meeting Ecorse Creek Pollution Abatement Drain No. 2 Drainage Board held December 17, 1980.
7. Drainage Board for the Ecorse Creek Pollution Abatement Drain No. 2 held December 29, 1980.

8. Minutes of the Meeting of the Drainage Board for the Ecorse Creek Pollution Abatement Drain No. 2 held December 29, 1980.

Sempliner, Thomas, Tiplady and Boak
Attorney for Defendant
By: /s/ Robert P. Tiplady P25760
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Plymouth, MI 48170
455-4560 or 453-6220

A meeting of the Drainage Board for the Ecorse Creek Pollution Abatement Drain No. 2 was held at the office of the Wayne County Drain Commissioner, 900 W. Lafayette, Detroit, Michigan, 48226, at 10:00 A.M., Eastern Daylight Time, on Wednesday, September 17, 1980.

The meeting was called to order by the Chairman, Charles N. Youngblood, at 10:00 A.M., E.D.T.

Present: Charles N. Youngblood, Chairman, Wayne County Drain Commissioner; Ted Mrozowski, Vice Chairman, Wayne County Board of Auditors, as per Section 464 of Act 285 of Public Acts of Michigan of 1970; Clemens E. Bykowski, Vice-Chairman, Wayne County Board of Commissioners, as per Section 464 of Act 285 of Public Acts of Michigan of 1970.

Also Present: *Wayne County Drain Commissioner's Office* — Jeffrey Supowit (Counsel), Robert Jarrett (Chief Engineer), Mike Bink (Civil Engineer IV), Albert Mardirosian (Accountant V), Anna M. Pfefferle (Special Drain Planning and Grant Coordinator), Henrietta Wypiszewski (Secretary to Mr. Supowit); Charles R. Moon, Dickinson, Wright, McKean, Cudlip & Moon; Jack H. Cvengros, Stauder, Barch & Associates; Nate Shapiro, Consulting Engineering Associates, Inc.; Chester C. Piece, Consultant; Herbert Lamkin, Wade,

Trim & Associates, Inc.; Larry Berg, Attorney for Greenfield Construction Company, Inc.; Angelo DiPonio, Greenfield Construction Company, Inc.

This meeting is being recorded by Consulting Engineering Associates, Inc., by order of the Drainage Board and the tape is being held as a permanent record of this meeting.

The Chairman presented the minutes of the meeting held on August 7, 1980, by the Drainage Board for the Ecorse Creek Pollution Abatement Drain No. 2, for approval.

It was moved by Mr. Bykowski that the minutes be approved and placed on file. Supported by Mr. Mrozowski.

Motion carried by the following vote.

Ayes: Bykowski, Mrozowski, Youngblood

Nays: None

The Chairman presented excerpts from minutes of meetings held and of proceedings and resolutions aodpted (sic) by the Drainage Board for the Ecorse Creek Pollution Abatement Drain No. 1 which should be incorporated in and become part of the records of the proceedings of this Drainage Board for the Ecorse Creek Pollution Abatement Drain No. 2, and which are as follows:

1. Dated February 13, 1980:

The following resolution was offered by Mr. Kelly and supported by Mr. Bykowski:

**Be it hereby resolved that the firm of Wade, Trim & Associates, Inc. be retained as engineers for the project and that the Chairman be empowered to execute contract with Wade, Trim & Associates, Inc.**

Be it further resolved that the firm of Dickinson, Wright, McKean, Cudlip & Moon be retained as Bond Counsel and that the Chairman be empowered and directed to execute contract with Dickinson, Wright, McKean, Cudlip & Moon.

And be it further resolved that the firm of Shannon and Company be retained as Financial Consultants for the project and that the Chairman be empowered and directed to execute contract with Shannon and Company.

Adopted: Ayes: Kelly, Bykowski, Youngblood.
Nays: None.

*Page 129 – Joint Appendix, CA6*

It was moved by Mr. Bykowski that the foregoing excerpts of minutes, proceedings and resolutions taken from the records of the Drainage Board for the Ecorse Creek Pollution Abatement Drain No. 1 be incorporated in and become part of the records, for all purposes, of the Drainage Board for the Ecorse Creek Pollution Abatement Drain No. 2 to the same extent as though received and adopted by this Drainage Board.

Supported by Mr. Mrozowski

Motion carried by the following vote:

Ayes: Bykowski, Mrozowski, Youngblood

Nays: None

There was presented to the Drainage Board the Final Order and Judgment entered on June 30, 1980, in the U.S. District Court, Eastern District of Michigan, Southern Division, by Chief Judge John Feikens, * * *

*Pages 163 and 211 – Joint Appendix, CA6*

**MINUTES OF THE MEETING OF THE DRAINAGE BOARD FOR THE ECORSE CREEK POLLUTION ABATEMENT DRAIN NO. 2**

A meeting of the Drainage Board for the Ecorse Creek Pollution Abatement Drain No. 2 was held in the Allen Park City Hall, 16850 Southfield Road, Allen Park, Michigan, on the 12th day of November, 1980, at 6:00 o'clock P.M., Eastern Standard Time.

The meeting was called to order by the Chairman, Charles N. Youngblood at 6:00 P.M.

Present: Charles N. Youngblood, Chairman, Wayne County Drain Commissioner; Samuel A. Turner, Member, Chairman, Wayne County Board of Commissioners

Absent: Richard T. Kelly, Member, Chairman, Board of Auditors of Wayne County

Also Present: *Wayne County Drain Commissioner's Office* — Michael Bink (Engineer V), Henrietta Wypiszewski (Secretary to Mr. Supowit); Dave Sprow, Water Quality Division, Dept. of Natural Resources; Paul Zuger, Environmental Enforcement Division Dept. of Natural Resources; Mary Ellen Fallon, Dept. of Natural Resources; Jack H. Cvengros, Stauder, Barch & Associates; Charles R. Moon, Bond Counsel; Nate Shapiro, Consulting Engineering Associates, Inc.; Harry Barsamian, Consulting Engineering Associates, Inc.; Don Trim, Wade, Trim & Associates, Inc.; Herbert Lamkin, Wade, Trim & Associates, Inc.

* * *

*Excerpt from Page 211 – Joint Appendix, CA6*

At the request of Kenneth D. Kruse, attorney for the City of Allen Park, it was agreed by members of the Drainage Board that the hearing on apportionments should be recessed, after all persons present who want to speak have been heard, so that Mr. Kruse and other city officials can confer with Messrs. Trim and Shapiro and Bink to verify the method of apportionment and the calculations used therefor.

* * *

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